

Atlanta, Georgia and Birmingham, Alabama.^{14/} In addition to this major urban area competition, even Nextel recognizes the unique ability of the Southern system to serve rural areas. As noted in the trade press, Nextel's executive director of investor relations, Paul Blalock, has said: "There's plenty of room in the market for Southern. We think they are positioned a little differently, focused on a different part of the southeast. Nextel's emphasis is covering the southeast highway corridor; Southern's network covers expansive rural areas."^{15/} Almost all "commercial" wireless telecommunications systems focus on urban areas and roaming corridors (interstate highways). Due to its foundation in wide-area, utility service communications, Southern's system provides highly reliable, robust, and almost total urban and rural area coverage.

34. Southern's system offers an array of wireless services to businesses, including voice (mobile telephony), two-way dispatch, and text/numeric messaging and data communications. Southern is unique among wide area telecommunications providers in that it provides extensive rural coverage. Moreover, it covers virtually 100 percent of its 120,000 square mile utility service area throughout Georgia, Mississippi, Alabama and

^{14/} In fact, the Department of Justice recently approved the required divestiture by Nextel of 42 800 MHz channels in Atlanta to a viable competitor, Southern, so that market concentration in Atlanta, Georgia would be decreased.

^{15/} "Utilities Firm Markets SMR to Businesses," Radio Communications Reports, February 12, 1996, p.1.

Florida.^{16/} Hence, its utility-based design features provide rural areas with a depth and quality of coverage traditionally reserved for urbanized areas.^{17/}

35. The wide-area coverage provided by Southern's system stands in contrast to the largely urban-based focus of wide-area SMR and broadband PCS systems. This is not meant as a criticism of wide-area SMR or PCS systems, but merely to point out that the Commission's construction requirements for wide-area SMR/PCS systems creates an incentive for licensees to provide service first to major urbanized areas before providing service to rural areas, if ever.^{18/} Broadband PCS licensees of the 30 MHz blocks must provide service to one-third of the population of their

^{16/} Southern also covers a small area of Tennessee.

^{17/} Other wide area communications systems, such as those licensed to Nextel Communications, Inc., are "top 10 market" urban area systems. Rural areas are covered only where they lie between two major cities such as Los Angeles and San Francisco. On the other hand, Southern, with the need for wide-area coverage of its electrical distribution grid, provides equal grades of coverage to both rural and urban areas.

^{18/} For example, in many, if not all, Major Trading Areas, the two-thirds service requirement can be met simply by providing coverage to the two or three Basic Trading Areas surrounding each major urbanized area within the MTA. For MTAs in the southeastern U.S., this coverage often includes only one major urbanized area. Each Economic Area (EA) consists of one or more economic nodes (metropolitan areas) and the surrounding counties that are economically related to the nodes. Commuting patterns are the main factor used in determining the (EA) economic relationship among counties. See 60 Fed. Reg. 13,114 (March 10, 1995). While EAs are considerably smaller than MTAs (but larger than BTAs), the fact remains that EA coverage benchmarks can be achieved by serving Metropolitan Statistical Areas without covering rural areas.

geographic area within five years, and two-thirds after ten years. Broadband PCS licensees of the 10 MHz blocks need only serve one-quarter of the population of their Basic Trading Areas within five years of license grant.^{19/}

36. The wide-area SMR Service construction rules for 800 MHz and 900 MHz systems also have a predisposition that encourages licensees to construct their systems so as to serve the cores of urban areas long before rural areas are served, if ever. Economic Area (EA) licensees in the 800 MHz SMR service will only have to serve one-third of the population of the EA service area at the three-year point in their license term, and serve two-thirds at the five-year benchmark. For 900 MHz Major Trading Area SMR licenses, one-third of the MTA population must be covered at the three-year point in the license term, with two-thirds coverage required five years into the ten-year license term.^{20/}

**VII. SOUTHERN'S SYSTEM COULD BE EMPLOYED BY FEDERAL AGENCIES
THAT ARE UNDER THE 1993 BUDGET ACT MANDATE TO CONVERT
TO COMMERCIAL OPERATIONS**

37. The 1993 Budget Act requires the Federal Government to convert government radiocommunications operations to private

^{19/} Broadband PCS construction requirements are set forth in 47 C.F.R. Section 24.203.

^{20/} For 800 MHz EA systems, see 47 C.F.R. Section 90.685(c), as published at 61 Fed. Reg. 6158 (February 16, 1996). For 900 MHz systems, see 47 C.F.R. Section 90.665(c) (1995).

sector ("commercial") providers to the maximum extent practicable.^{21/} This requirement derives from the 1993 Budget Act mandate that specific amounts of government spectrum be transferred, on a timetable, to the jurisdiction of the Federal Communications Commission for subsequent reallocation and assignment by the Commission. Southern's system provides a highly reliable, wide-area telecommunications service that could easily accommodate the needs of Federal agencies whose radiocommunications requirements are under pressure to be converted to commercial operations.

38. Recently, Senator Pressler introduced draft legislation that proposes to, among other things, hasten the reallocation of spectrum used for Federal Government radiocommunications operations to the private sector, to be regulated by the Federal Communications Commission.^{22/} Under the draft legislation, federal agencies would be encouraged to consolidate their radiocommunications operations, employing private sector (FCC-regulated) commercial providers to the maximum extent feasible.^{23/} Southern's system has the reliability and

^{21/} Section 113(c)(B)(i) of Title VI of the 1993 Budget Act.

^{22/} "Spectrum Reform Discussion Draft, Electromagnetic Spectrum Management Policy Reform and Privatization Act, 104th Congress, Second Session, introduced by Senator Pressler, May 9, 1996.

^{23/} Section 6(b) of draft legislation amending Section 113 of the National Telecommunications and Information Administration Organization Act (47 U.S.C. § 901 et seq.)

coverage that would make it a good candidate for relocated or consolidated federal government operations.^{24/}

VIII. **THE COMMISSION IS STATUTORILY REQUIRED TO IMPLEMENT
REGULATORY SYMMETRY AMONG "SUBSTANTIALLY SIMILAR"
CMRS PROVIDERS**

A. Statutory Mandate

39. In passing the 1993 Budget Act amendments, Congress mandated regulatory parity in the Commercial Mobile Radio Service legislative scheme. Section 6002(d)(3) of the 1993 Budget Act requires the Commission to promulgate regulations applicable to CMRS entities that were previously private land mobile service providers. This section provides, in relevant part:

[The Commission] shall make such other modifications or terminations as may be necessary and practical to assure that licensees in such service are subjected to the technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar common carrier services[.]

1993 Budget Act, Title VI, § 6002(d)(3)(B). According to the legislative history, Congress intended "to provide that equivalent mobile services are regulated in the same manner."^{25/} It directs the Commission to review its rules and regulations to

^{24/} See, "Southern Wins SEC Approval to Invest \$179 million in Communications Unit," Electric Utility Week, January 9, 1995, p.12.

^{25/} See H.R. Rep. No. 111, 103rd Cong. 1st Sess. 253, (1993) at 259, reprinted in 1993 U.S.C.C.A.N. 572, 586.

achieve regulatory parity among services that are substantially similar.^{26/}

40. The legislative history further reveals that "the rules are intended to ensure that services that were formerly private land mobile services and become common carrier services as a result of this Act are subjected to technical requirements that are comparable to the technical requirements that apply to similar common carrier services."^{27/} Consistent with the congressional objective of regulatory parity, the legislative history states that Congress intended that the Commission refrain from granting "any right to a licensee [pursuant to auction] different from the rights awarded to licensees who obtained their license through assignment methods other than competitive bidding."^{28/}

B. Federal Communications Commission's Application Of The Statutory Mandate.

41. In the CMRS Third Report and Order, the Commission stated its intention to adopt rules for the CMRS marketplace that would: (1) facilitate technology; (2) provide better coverage to the public; and (3) promote competition thereby lowering costs to

^{26/} Id.

^{27/} H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 498 (1993) (hereinafter "House Conf. Rep.").

^{28/} See 47 U.S.C. § 309(j)(6)(D); House Conf. Rep. at 485.

consumers.^{29/} In defining the CMRS marketplace, the Commission concluded that all CMRS licensees-- including paging, SMR, PCS, and cellular-- are actual or potential competitors with one another, and therefore should be regarded as substantially similar for determining whether the statutory requirement for comparable technical rules applies.^{30/}

42. The Commission recognized that the congressional mandate to treat similarly situated CMRS providers equally derives from the Congressional goal "to ensure that economic forces--not disparate regulatory burdens--shape the development of the CMRS marketplace."^{31/} The Commission has stated that its goal in regulating the CMRS marketplace is to "minimize[] the potentially distorting effects of asymmetrical regulation."^{32/} "This in turn leads [the Commission] to conclude that, to the extent practical, technical and operational rules should be comparable for virtually all existing and reclassified CMRS services."^{33/} The Commission further stated that it intended to maximize flexibility "so that carriers have a real opportunity to

^{29/} See CMRS Third R&O ¶ 1.

^{30/} First R&O and Order ¶ 42 (citing Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Third Report and Order, 9 FCC Rcd 7988, 8009-8035 ¶¶ 37-77 (1994)).

^{31/} CMRS Third R&O at 7994 ¶ 4.

^{32/} Id. at 7996 ¶ 13.

^{33/} Id. at 7997 ¶ 14.

use their allocated spectrum in ways that adapt quickly to changing consumer demand." Id. 8011 at 41.

43. Over the years, the Commission has granted scores of waivers and extended implementation requests to SMR and other licensees proposing to construct wide area enhanced technology systems. See Fleet Call, Inc., 6 FCC Rcd. 1533 (1991); Powerspectrum, 8 FCC Rcd. 4452 (1993); Nextel Communications, Inc., 10 FCC Rcd. 3361 (1995). A primary reason the Commission originally authorized extended implementation authority was to encourage development of more competitive wide-area, digital SMR systems. Fleet Call, Inc., 6 FCC Rcd. at 1533. The Commission has previously stated that allowing SMR systems the opportunity to install advanced digital technology to establish wide-area systems is essential to maintaining competition in the CMRS marketplace.^{34/} Prior Commission rules force SMR systems to compete with cellular systems on an uneven playing field because of discriminatory regulatory burdens and the excessive costs of providing service.^{35/}

C. The Commission Justified The Rules Adopted In The First R&O By Pointing To The Statutory Mandate.

44. For the reasons stated above, throughout the First R&O, the Commission attempted to craft rules that would allow EA

^{34/} CMRS Second R&O ¶ 143.

^{35/} CMRS Second R&O ¶ 143; CMRS Third R&O pp. 85, 95 and 96.

auction winning licensees to compete on an equal basis with cellular and PCS providers. The Commission stated that the rules in the First R&O will "further the congressionally mandated goal of regulatory symmetry between 800 MHz SMR licensees and other competing providers of Commercial Mobile Radio Services (CMRS)." ^{36/}

45. For example, the Commission determined that "a key element in any new licensing scheme for wide-area SMR systems is to afford licensees the same flexibility, to the extent feasible, as cellular and broadband PCS licensees in terms of location, design, construction, and modification of their facilities throughout their service areas." ^{37/} For this reason, the Commission adopted construction requirements that allow an EA auction winner substantial flexibility in terms of system design. First, the Commission determined that EA licensees should have a five-year construction period. ^{38/} Second, the Commission

^{36/} First R&O ¶ 2. Even Nextel, the primary beneficiary of the rules promulgated in the First R&O, recognizes that regulatory parity is the key to effective competition in the CMRS marketplace. According to Nextel, "[t]he First R&O addresses Congress' mandate in the Omnibus Budget Reconciliation Act of 1993 ("Budget Act") that the Commission create regulatory parity for all Commercial Mobile Radio Services ("CMRS") providers in order to promote competition. It ensures that competitive advantages are determined in the telecommunications marketplace rather than by regulatory obstacles or benefits." Nextel Communications, Inc. Pet. for Partial Recon. and Clarification at 3 (March 18, 1996).

^{37/} First R&O ¶¶ 49-52.

^{38/} Id. ¶ 104.

determined that EA licensees need only provide coverage to one-third of the population of their respective EAs within three years of the initial license grant and to two-thirds by the end of their five-year construction period so long as the EA winner uses fifty percent of its discrete channels ("the interim coverage requirements").^{39/}

46. Similarly, in rejecting a spectrum aggregation limit for EA auction winners, the Commission stated that a spectrum aggregation limit for the 800 MHz SMR spectrum "could handicap these potential competitors to broadband PCS and cellular providers with equal or larger spectrum holdings."^{40/} Moreover, the Commission determined that the automatic recovery of spectrum by the EA auction winner will increase competition because "the CMRS market in general and not the 800 MHz SMR service in particular is the relevant market for assessing the competitive impact in this context."^{41/}

^{39/} Id. ¶ 121.

^{40/} See First R&O ¶ 44.

^{41/} Id. ¶ 61.

IX. BECAUSE THE COMMISSION IS STATUTORILY COMPELLED TO TREAT SIMILARLY-SITUATED CMRS PROVIDERS EQUALLY, THE COMMISSION MUST APPLY THE EA CONSTRUCTION RULES TO SOUTHERN

- A. Application of the Interim Coverage Requirements to Southern is Mandated By the 1993 Budget Act and the Commission's Implementation of the Act.

47. Because Southern is a CMRS provider operating in the 800 MHz spectrum band, and because the Commission determined that such CMRS providers effectively compete with PCS and cellular, there is no reasoned basis for denying Southern the same type of construction flexibility that applies to EA license winners, cellular and PCS providers. The Budget Act directs the Commission to review its rules and regulations to achieve regulatory parity among services that are "substantially similar." Indeed, the Commission rationalized many of the rules adopted in the First R&O in an effort to heed this command.^{42/} For this reason, the Commission cannot severely handicap Southern by imposing site-by-site, channel-by-channel construction requirements on Southern while allowing other CMRS competitors the flexibility inherent in the population coverage construction standard. Such action simply cannot be reconciled with the statutory mandate or prior rulings by the Commission.

48. For example, the Commission determined that "continuing to impose mobile loading requirements on some CMRS providers but not others contravenes the Congressional goal of regulatory

^{42/} See Discussion infra VIII.C.

symmetry and could unfairly impair the ability of certain licensees to compete."^{43/} In light of the statutory mandate to achieve parity and all of the above-referenced policy and rule pronouncements, it would be contradictory and inequitable for the Commission to put only the EA winners in a position to compete with cellular and PCS.

49. More significantly, however, the import of the 1993 Budget Act parity command is no where more acute than when applied to CMRS providers within the same service. Southern will directly compete with the EA licensees for customers in the dispatch market. Because Congress, the Commission and the Department of Justice have indicated their concern with maximizing competition in every facet of the CMRS marketplace, it absolutely is irreconcilable for the Commission to fail to level the playing field so that Southern can operate under construction rules applicable to other CMRS licensees.^{44/}

50. The Commission has stated that the purpose of the EA auction is to provide the auction winning SMR with sufficient

^{43/} CMRS Third R&O at 8081 ¶ 190.

^{44/} How the CMRS entity originally obtained its spectrum is irrelevant to the requirement of regulatory parity. Southern obtained its spectrum through the FCC licensing process. Cellular entities obtained their spectrum either by lottery or routine licensing. PCS, and future SMR EA providers obtain theirs through auction.

"contiguous spectrum" to compete in the CMRS market place.^{45/} The EA auction winner is not buying more favorable regulatory treatment, but instead is buying contiguous spectrum that is technically similar to cellular and PCS spectrum blocks. The Commission has also determined to apply to EA licensees construction requirements that are measured by the percentage of the population covered and the number of channels used.^{46/} These construction measures allow the EA auction winner sufficient flexibility in building and operating its system so that the EA auction winner can provide immediate competition to PCS and cellular, while not foregoing the opportunity to respond to future changes in demand for service in the CMRS marketplace. Because Southern already provides a service that directly competes with existing CMRS providers, there is no reasoned basis for failing to afford Southern the construction flexibility similar to that granted to the EA auction winner.^{47/} More importantly, however, such discriminatory action directly violates the 1993 Budget Act because it unjustifiably erects a

^{45/} Indeed, this need for contiguous spectrum justified the Commission's decision to permit mandatory relocation of all incumbents out of the Upper 200 channels in the 800 MHz spectrum.

^{46/} See Discussion infra ¶ 44.

^{47/} Southern is already at a slight disadvantage in the CMRS marketplace because of its lack of contiguous spectrum.

regulatory barrier to competition in the CMRS marketplace for one participant.^{48/} This, the Commission cannot do.

B. Southern's Request is Unique Because the Relief That it Seeks Will Not Interfere With the Commission's Auction of the Upper 200 Channels In the 800 MHz Spectrum.

51. The clear majority of Southern's relatively few channels in the Upper 200 are already constructed. Therefore, Southern's request does not conflict with the Commission's wide-area licensing scheme for the Upper 200 channels in the 800 MHz spectrum band. The Commission's rationale for requiring the rejustification is based on its concern for EA license winners. Specifically, the Commission was concerned about unconstructed incumbents infringing on the rights of the EA license winner because of the prohibition on the transfer of unconstructed facilities.^{49/} For this reason, the Commission's concern over any adverse impact on potential EA license winners is not implicated by granting Southern construction parity.

^{48/} Such action seems particularly egregious considering that the Commission has recognized that the CMRS marketplace is dominated by the "largest wireless companies." CMRS Third R&O at 239. As such, competing against such formidable companies is difficult enough without having to overcome substantial regulatory burdens.

^{49/} First R&O ¶ 110.

X. APPLICATION OF THE INTERIM COVERAGE REQUIREMENTS SHOULD BE APPLIED TO SOUTHERN ON A SYSTEM-WIDE BASIS

52. Parity requires application of the interim coverage requirements discussed above to Southern's 800 MHz SMR system. However, parity dictates that it not be on an EA-by-EA basis.^{50/} The EA construct was created in order to facilitate the auctioning of the Upper 200 channels in the 800 MHz spectrum. The determination to license on an EA basis largely was motivated by a desire to maximize the number of potential bidders at auction "because small and medium-sized operatives will have incentives to seek EA licenses in those markets where they are the largest incumbents."^{51/}

53. The EA construct was not developed with Southern's service territory in mind. Southern's service territory currently spans over four states, serving all or parts of 22 EAs. Because Southern's service territory does not mirror the EA geographic designation, it simply does not make sense to apply the EA construct to Southern's request. For this reason the geographic limitations of the EA construct should not apply to the construction relief which Southern is seeking. As such, Southern requests that the population and discrete channel

^{50/} Notably, application of the interim coverage requirements to Southern's system is also consistent with past actions of the Commission. For example, in 1991, the primary reason the Commission made an exception to its construction requirements was to encourage development of a more competitive wide-area, digital SMR system. See Discussion infra ¶ 42.

^{51/} First R&O Discussion ¶ 23.

construction criteria as discussed above be applied to Southern on a system-wide basis. Therefore, since Southern has constructed over 50 percent of its discrete 800 MHz SMR channels and has covered over 90 percent of the population in its service territory, it has met and indeed exceeded the appropriate construction standards of a CMRS provider.

Respectfully submitted,

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AFFIDAVIT

I, Paul J. DeNicola, Executive Vice President and Group Executive of The Southern Company, hereby certify that I have read the "Response to Request for Rejustification of Extended Implementation Authority of The Southern Company." I further certify that the factual statements contained in the aforementioned document are accurate and true.

Date: 7/15/96


Paul J. DeNicola
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The Southern Company